

MINUTES

MONTANA SENATE 56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN WILLIAM CRISMORE**, on February 12, 1999 at 3:00 P.M., in Room 405 Capitol.

ROLL CALL

Members Present:

Sen. William Crismore, Chairman (R)
Sen. Dale Mahlum, Vice Chairman (R)
Sen. Vicki Cocchiarella (D)
Sen. Mack Cole (R)
Sen. Lorents Grosfield (R)
Sen. Tom Keating (R)
Sen. Bea McCarthy (D)
Sen. Ken Miller (R)
Sen. Glenn Roush (D)
Sen. Mike Taylor (R)
Sen. Bill Wilson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Larry Mitchell, Legislative Branch
Jyl Scheel, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 371, 2/12/1999; SB 313,
2/12/1999
Executive Action: SB 235; SB 314; SB 316; SB
362; SB 371

HEARING ON SB 371

Sponsor: SENATOR KEN MESAROS, SD 25, CASCADE

Proponents:

John Mundinger, Montana Stockgrowers Association
Mike Murphy, Montana Water Resources Association
Tom Gerhardt, Belt

Opponents: None.

Opening Statement by Sponsor:

SENATOR KEN MESAROS, SD 25, CASCADE, stated **SB 371** is an "act requiring a person developing a ground water source of 35 gallons a minute or less, with the source on another person's land, to notify the other landowner in advance of the proposed development and appropriation." This bill says the person that wants to develop a ground water source must notify the real property owner by written notification so the property owner knows in advance and is well aware of what may be potentially developed on his land. There is a situation in his district where the property owner did convey a right to half of the spring and easement to the spring. A second spring was developed and unbeknownst to the owner, the water right was filed to the user that was external to the property. This bill is trying to prevent this type of situation in the future.

Proponents' Testimony:

John Mundinger, Montana Stockgrowers Association, spoke in support of **SB 371**. They are in agreement with **SEN. MESAROS** logic on the bill.

He also spoke in support of the bill for **Mike Murphy of the Montana Water Resource Association.**

Tom Gerhardt, Belt, stated he had given the user the right to use the water and they developed the spring together. He did not mean for him to claim the water legally nor did he have legal access. Under the law, you do not have to advertise a developed spring or let the owner know. Notification is necessary for surface water. He sought legal advice and the attorney felt all water should be treated the same, i.e. no matter what is done with water it should be advertised and the people that might be involved be notified. In order to get his water back they are using the argument it is a surface water development. If all water usage had to be noticed, it would help to prevent a situation like this.

Opponents' Testimony: None.

Questions from Committee Members and Responses: None.

Closing by Sponsor:

SENATOR KEN MESAROS, SD 25, CASCADE, stated this was a courtesy written notification of intent for developing water and he hopes this bill will eliminate some problems in the future. He hoped for favorable consideration on SB 371.

{Tape : 1; Side : A; Approx. Time Counter : 0 - 6.2; Comments : None.}

HEARING ON SB 313

Sponsor: SENATOR KEN MESAROS, SD 25, CASCADE

Proponents:

Mark Simonich, Director, Department of Environmental Quality

Opponents:

Anne Hedges, Montana Environmental Information Center

Gail Abercrombie, Executive Director, Montana Petroleum
Association

Steve Pilcher, Golden Sunlight Mines and City of Billings

Bill Neal, Montana Mining Association

Jim Mockler, Executive Director, Montana Coal Council

Beth Cading, Bozeman, Member of Northern Plains Resource Council

Don Allen, Western Environmental Trade Association

Denise Roth Barber, Montana Sierra Club

Chris Gallus, Montana Chamber of Commerce

Bob Brown, Columbia Falls Aluminum Company

Opening Statement by Sponsor:

SENATOR KEN MESAROS, SD 25, CASCADE, presented SB 313 for the committee's consideration on behalf of the Department of Environmental Quality. SB 313 is a very comprehensive bill which amends 45 statutes and repeals 53 statutes. There are many good issues in this bill as well as many section changes that would demonstrate the predictability, consistency and fairness in enforcement which are long overdue. With the amount of repealers and amendments, the bill has been streamlined to have less red tape. There is no decrease in penalties but primarily just

consolidates existing language. A lot of work and hours have gone into this legislation.

Proponents' Testimony:

Mark Simonich, Director, Department of Environmental Quality, spoke in support of the bill as per **EXHIBIT(nas35a01)**.

Opponents' Testimony:

Anne Hedges, Montana Environmental Information Center, stated the goals of predictability, consistency and fairness are laudable. It provides administrative penalty authority and increases the statute of limitations. The concept is good. The problem, however, is there is nothing mandatory in the bill. It gives total discretion to the agency to do what it wants, when it wants and how it wants. **MEIC** want some type of assurance the agency will have to do certain things at certain points in the process. On pages 4 and 5, it says "may" issue an order, "may" service a notice of violation and "may" issue an emergency order. They believe some of these things should be mandatory, not only for the environmental information, but for industry. A paper trail is needed. This bill will not work in its present state. It is just too cumbersome to try to fix this close to transmittal. She suggested it be put in an interim committee with the **Environmental Quality Council** to be able to study it and do it right.

Gail Abercrombie, Executive Director, Montana Petroleum Association, stated she would like to see this effort go to the **EQC** with an interim study committee so the environmental community, the Department and the regulated community can sit around the table and work this out. They were also approached in November with a draft of the bill and submitted some comments at that time. Some of their comments were incorporated and some were not. There are issues of corporate officers liability, the presumption of continuing violation, and the breadth of this bill. A broad spectrum of people are affected and need to be around the table to discuss this bill.

Steve Pilcher, Golden Sunlight Mines and City of Billings spoke in opposition to the bill as per **EXHIBIT(nas35a02)**.

Bill Neal, Montana Mining Association, spoke in opposition to the bill. They commended the **Department of Environmental Quality** for trying to bring conformity to the enforcement of the environmental regulations but this bill is not one they can support. They particularly object to the whole concept between

Section 9(3) in the compliance orders where if someone is accused of something, the burden of proof is on them. The accused is presumed to be guilty unless they can prove they are innocent. That is quite a reversal of the accepted rule of justice in this country where a person is innocent until proven guilty. The use of this concept can be abused quite easily by government agencies. It can lead to frivolous and vindictive accusations when the political climate allows. They are in concurrence with the statements made by the other opponents.

Jim Mockler, Executive Director, Montana Coal Council, spoke in opposition to **SB 313**. He agrees with the other opponents that the goals are admirable. The Coal Reclamation Act is driven by federal law and therefore not included. It draws out how essentially different these acts are. They find it particularly onerous that corporate liability is included. They do not think government needs to serve the public, the public is to come and serve them at their convenience, in their court and in their time with a continuing violation on the officers of the corporation. How do you hire good people and keep them in jobs where they belong with a \$10,000 per day violation that could be hanging over their head. He fails to see the need for the bill and hopes the committee will table it.

{Tape : 1; Side : A; Approx. Time Counter : 6.2 - 43; Comments : None.}

Beth Cading, Bozeman, Member of Northern Plains Resource Council, spoke in opposition to **SB 313**. They have some serious concerns with **SB 313** but they are not opposed to the concept to streamline enforcement. They are in agreement with the Department's ability to recover its enforcement costs with this bill. They agree with the corporate liability provisions as well as the ability to inspect private residences with key information about violations that might be harbored there. While they are pleased to see the extension of the statute of limitations to three years, they would like to point out, in some instances, the Environmental Protection Agency has a five year statute of limitations. They believe **DEQ** should not be less than federal statute of limitations.

Their most important concern is **DEQ** would have no obligation to record or respond to violations. Another concern is the eminent threat provisions. Finally, citizens affected by violations in environmental law should have the ability to compel enforcement through citizen suit when the Department fails to do so. They would like to see the bill amended to include the citizen suit provision. They support the previous proponents desire to see

this bill go to an **EQC** interim study committee for further review.

Don Allen, Western Environmental Trade Association, stated he greatly appreciated how hard the Department had tried to work with all these groups on this bill. He feels the bill has areas that need work and if it were not so late in the session perhaps there would be an opportunity to try to work these things out. The biggest concern of **WETA** is in Section 5 - Power to require information and monitoring. They feel the Department should not be allowed to have unbridled discretion to impose monitoring and new information requirements on the regulated community. This could be expensive and burdensome. In the notice of violation there needs to be a provision for a hearing. Another concern is venue. The appeals from the final agency action should be in the county where the alleged violation occurred not in Lewis and Clark County. There should not be a separate violation unless there is a separate triggering event to cause that to happen.

Denise Roth Barber, Montana Sierra Club, spoke in opposition to the bill because it rarely requires **DEQ** to take enforcement action. There are eighteen "mays" in the bill. The Department does have the ability to take enforcement action but they do not have faith they have the will to take enforcement action.

They also have concern about "may issue an emergency order". If the public health is facing an eminent threat or there is going to be significant environmental damage, the Department "shall" issue an emergency order. The order, as it reads now, may continue as long as necessary to address the problem or until 90 days have passed. Why remove an emergency order if the emergency is still in place?

Another concern that has not been raised yet is Section 13 - Costs and expenses. The Department "may" request to be reimbursed for its costs for a violation. Definitely the responsible violator and not the taxpayer should have to reimburse the state for the action it took to address a violation.

Chris Gallus, Montana Chamber of Commerce, spoke in opposition to the bill. He agrees there is good and bad in the bill. It is worthy of a lot of discussion and perhaps too much discussion to be handled in this process at this time.

Bob Brown, Columbia Falls Aluminum Company, spoke in opposition to the bill. It is 66 pages long, it repeals 50 some sections and amends 40 some sections and adds 30 new sections. It is a

perfect candidate to be placed into an interim committee so the legislature can study it and know more about it the next session.

{Tape : 1; Side : B; Approx. Time Counter : 0.00 - 11.1; Comments : None.}

Informational Testimony:

Frank Crowley, ASARCO, Coal Strip Energy Limited Partnership and Yellowstone Energy Limited Partnership, spoke on behalf of his clients as an informational witness today. He believes there is firm, fair and appropriate enforcement right now in this agency. One must be cautious with terms like search warrant, concepts like corporate officer liability, emergency orders and three year statute of limitations.

There are some subtleties in the bill that take time to look at, i.e. in the judicial penalties section of the statutes. The duration of the violation may be established by "any credible evidence including non-applicable testament". Another point is the Department has taken some very hard enforcement mechanisms for one or two statutes and now has extended them throughout the entire range of their jurisdiction. 1) Cost recovery: it used to be just a phenomenon of the Superfund Program, then it went to the water programs, and now there will be cost recovery in every program. That is not all bad, but cost recovery can be extremely expensive in some cases. 2) Regarding assessment of the penalties: penalties must be determined considering several factors. One is the economic benefit of noncompliance. Very detailed financial information is required of the alleged violator. Sometimes it is put through a straight forward computer model. He feels more consideration needs to be given to "must be considered" every time a penalty is assessed in each of these programs.

This is a big pill to swallow and before we swallow it we need to know what it is that we are ingesting.

Questions from Committee Members and Responses:

SENATOR MAHLUM questioned page 30, Section 37, lines 18 and 19, regarding should fines collected be deposited in the solid waste management account rather than reimbursing the county for the person's jail time? **Mr. Simonich** stated no he did not. He understood this was statutory authority they already had and he was not sure why it was put in this particular section other than it was done to match where it is in other places. This is a judicial authority. The Department does not have any authority to put anyone in jail. He did not think it appropriate for the

money to come to the Department if someone does go to jail and county is incurring cost. The Department would be comfortable with any of those penalties going directly into the General Fund.

SEN. MAHLUM said the problem is with the word "or". If the person is not fined \$100 but is put in jail for 30 days, that jurisdiction will be hurting. **Mr. Simonich** stated that is current law but this is an opportunity to fix that. **SEN. MAHLUM** stated Line 18 was his big concern.

SENATOR KEATING wondered if any public meetings were held while working on this proposal? **Mr. Simonich** stated there were no public hearings. The staff worked diligently through the summer and fall to draft the provisions and bring together the concepts. Just the drafting itself took a long time. They did make some attempts to talk to both industry and environmental groups in December.

SENATOR GROSFIELD questioned the presumption of continuing violation in the context of penalties. **Mr. Simonich** admitted this was detailed and often confusing language. He did not believe this legislation contains the type of language that provides them the assumption of continuing violation to the same degree one of the opponents stated. He is not sure where it exactly states in the bill the Department has this new authority.

SEN. GROSFIELD stated he had always had problems with "each day constitutes a separate violation". In the testimony today someone said, how do you have a separate violation for every day without some sort of separate trigger? How is that done?

Mr. Simonich said they look at if the condition created continues to exist. If someone dumped debris in a stream, each day that material is in the stream and continues to cause a contamination problem for the stream, that seems a separate violation. It is not that they went out each day and dumped another barrel into the stream. The condition was created and that condition continues to exist.

SENATOR GROSFIELD questioned Section 5 regarding the broadness of the monitoring authority. How would rule making be pursued to accomplish Section 5? **Mr. Simonich** said he did not think the Department was looking for broad or unbridled authority by any means. Rulemaking would probably nail that down. They would like to be able to collect, within reason, enough information to determine if there is a violation and then take appropriate action.

SENATOR GROSFIELD questioned corporate officer liability and their reasoning behind that? **John North, DEQ**, stated that provision is not contained in all the environmental acts. The idea behind it is that if civil penalties are provided for

responsible corporate officers, i.e. officers responsible for a violation occurring, then there is a more personal stake in insuring that a violation did occur. It is a means of preventing violations through enforcement.

SENATOR GROSFIELD questioned the presumption of continuing violation on page 9, section 11. What is the significance of that provision? **Mr. North** stated that provision pertains only to the air quality act and is existing language in the air quality act.

SENATOR GROSFIELD stated almost everyone wanted to turn the bill over to an **EQC** interim study committee. In the choice between no bill and interim study, can you wait two years? **Mr. Simonich** said the statements made that it is too late in the session and this is too complicated and too comprehensive to be dealt with in this short fashion is a big excuse. He feels it would be a mistake to refer to **EQC**. He suggests the committee take what is reasonable in this bill and move forward.

SENATOR GROSFIELD asked that **Ms. Abercrombie, Ms. Hedges and Mr. Allen** respond to the question. Is there any chance for this bill to be studied enough in two weeks to go on with it? **Ms. Hedges** said she was willing to try to make it work if it went into a subcommittee. **SEN. GROSFIELD** stated he did not mean for the bill go to a subcommittee but would the opponents be willing to work on the bill? **Ms. Hedges** said she was not sure there would be time for them to sit down and reach an agreement in two weeks, with all the other issues they are working on, if there is no structured process to work through. She feels the bill needs two months of work. **Ms. Abercrombie** stated she agreed the time element was an issue and also the focus they are able to bring at this point in time. She also agrees there are still going to be areas in the bill they eventually do not agree on. At this time she does not feel there is a great push to get this done right away.

Closing by Sponsor:

SENATOR KEN MESAROS, SD 25, CASCADE, thanked the committee for the good hearing. He feels there is good support for the intent and goals of the bill with time constraint being an issue. The compliance and enforcement issue has been studied considerably by **EQC**. He also has heard the concerns of the opposition and will leave the future of the bill to the infinite wisdom of the committee.

{Tape : 1; Side : B; Approx. Time Counter : 11.1 - 41; Comments : None.}

EXECUTIVE ACTION ON SB 235

Motion: SEN. KEATING moved that SB 235 DO PASS.

Motion: SEN. GROSFIELD moved that SB 235 AMENDMENTS SB023501.ALM DO PASS. **EXHIBIT**(nas35a03).

Discussion:

SENATOR GROSFIELD stated he wanted it clear in the statute that this was a special deal with regard to exception from abandonment and he did not want to have an open door for other people to come in and say they want out of abandonment too. The Whereas' set this out as a special situation dealing with A-closed drainages and diligence is tightened up so the committee would not be sorry this was opened up in the future. He appreciated working with Mr. Crowley on these amendments.

Vote: Motion that SB 235 AMENDMENTS SB023501.ALM DO PASS carried 9-0.

Motion/Vote: SEN. GROSFIELD moved that SB 235 DO PASS AS AMENDED. Motion carried 10-1 with SENATOR TAYLOR voting no.

EXECUTIVE ACTION ON SB 314

Motion: SEN. MCCARTHY moved SB 314 DO PASS.

Motion: SEN. GROSFIELD moved that SB 314 AMENDMENTS SB031401.ALM DO PASS. **EXHIBIT**(nas35a04).

Vote: Motion that SB 314 AMENDMENTS SB031401.ALM DO PASS carried 9-0.

Motion/Vote: SEN. MCCARTHY moved that SB 314 DO PASS AS AMENDED. Motion carried 10-1 with SENATOR MILLER voting no.

EXECUTIVE ACTION ON SB 316

Motion/Vote: SEN. KEATING moved that SB 316 BE TABLED. Motion carried 9-0.

EXECUTIVE ACTION ON SB 362

Motion: SEN. KEATING moved that SB 362 DO PASS.

Discussion:

SENATOR KEATING stated the landowners association along the high line can already take over a noncommercial gas well for their personal use on their property but they have to have either a certificate of deposit in the amount of a bond or they have to have some surety from the property as collateral. The ability to buy a surety bond takes less cash, has the same amount of protection and is a convenience to that landowner. A surety bond will make sure it is plugged. This bill gives another method of funding assurance of plugging the well with the Board of Oil and Gas.

SENATOR GROSFIELD said he had no problem with the bill but he thought the people that did the surety bonds disappeared and you could not get them anymore. Is that right? **SEN. KEATING** stated those were primarily drilling bonds for wildcat wells. These are available.

SENATOR ROUSH asked if the bonds were three year bonds or lifetime bonds? **SEN. KEATING** stated the term of the bond is through the well.

SENATOR COCCHIARELLA stated she still feels the Board of Oil and Gas are not setting the bonds high enough especially when it is a multiple well situation.

Vote: Motion that SB 362 DO PASS carried 11-0.

EXECUTIVE ACTION ON SB 371

Motion/Vote: SEN. GROSFIELD moved that SB 371 DO PASS. Motion carried 9-0.

CHAIRMAN CRISMORE stated we would not take executive action on SB 252, SB 253, SB 254 and SB 255 until after transmittal because they are revenue bills as well as being subject to CI-75.

{Tape : 2; Side : A; Approx. Time Counter : 0 - 16.1; Comments : None.}

ADJOURNMENT

Adjournment: 5:15 P.M.

SEN. WILLIAM CRISMORE, Chairman

JYL SCHEEL, Secretary

WC/JS

EXHIBIT (nas35aad)